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No. 691

In the Supreme Court of the United States

OCTOBER TERM, 1961

DOMINIC ALAIMO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 9–15) is not yet reported. The opinion of the district court denying motions in arrest of judgment, for judgment of acquittal, and a new trial is reported at 191 F. Supp. 625. The memorandum of the district court denying a motion to dismiss the indictment (R. 10–11)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1961 (Pet. 9). The petition for a

[1] The record consists of the appendices to the briefs of appellant and appellee below with loose papers attached thereto. "R." refers to the appendix of the appellant.

writ of certiorari was filed on January 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the acceptance by a labor union representative of thirty-four separate sums of money from an employer, on thirty-four different occasions, constituted separate offenses under the Labor Management Relations Act.

2. Whether the trial court erred in admitting, as evidence to rebut a defense, petitioner's statements given voluntarily in a grand jury proceeding on another matter, where some of the statements had been made after he had been admonished by the Assistant United States Attorney that he was improperly refusing to answer questions.

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157 (29 U.S.C. 186), provides in pertinent part:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the

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As we will discuss below (p. 7) the petition was filed out of time.

employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

STATEMENT

Petitioner was charged in thirty-four counts in the District Court for the Middle District of Pennsylvania with having unlawfully received, while a representative of mine employees, thirty-four sums of money on thirty-four different occasions from a mining company, in violation of the Labor Management Relations Act (29 U.S.C. 186(b)(d)).[1] After

[1] The indictment is partially set out on pages 6 through 8 of the record. Count one, after averring that the Knox Coal Company was an employer in an industry affecting interstate commerce and that petitioner was a representative of Knox employees, charged that on August 15, 1957, petitioner "did unlawfully, wilfully and knowingly receive and accept and agree to receive and accept from Knox the sum of $351.70 as follows: One check in the sum of $182.40 and one check in the sum of $172.30."

The remaining thirty-three counts involve dates on the fifteenth and last day of each of the succeeding months through December 31, 1958. The total sums involved, which vary from month to month and total $7,651.88, run from a high of $356.10 to a low of $[illegible]. Otherwise, the averments as to receipt are

the district court denied a motion to dismiss the indictment based on allegations of insufficiency and duplicity (R. 10-12); petitioner was tried and found guilty by a jury on all thirty-four counts (R. 31). He was sentenced to pay a fine of $7,651.88 on count one of the indictment and to serve a term of imprisonment of one year on each of counts two and three, the terms to run consecutively. As to the remaining counts—four through thirty-four inclusive—imposition of sentence was suspended and petitioner placed on probation for a total period of two years, conditioned upon the payment of the fine imposed under count one (R. 107). The court of appeals affirmed.

1. At trial the government's evidence[*] was established predominantly through documentary evidence (including state, company, and union records). These records showed that petitioner, at a time when he was acting as a union committeeman elected to settle employee grievances, received sums of money (paid either by one or two checks) at the end of each of the company's two-week pay periods from August 1, 1957, to December 31, 1958, ostensibly (as shown by time books and payroll sheets) as an employee. The government then produced witnesses who testified that

identical except for a slight difference in the counts beginning with count ten (see the charge of the court, R. 55-56). Counts ten through fourteen charge the receipt of "from Knox, the sum of ———, based on one payment of ——— and another payment of ———", and counts fifteen through thirty-four the receipt of "from Knox the sum of $———".

[*] The evidence is not in dispute and petitioner has not made the trial transcript a part of the record. We are, nevertheless, lodging a transcript with the Clerk of the Court.

petitioner was [illegible] time a motorman (the only occupation listed for him on company records) nor a watchman (as suggested during the trial).

Petitioner called witnesses for the purpose of attempting to show that he was at the time a watchman who received money for services rendered.

In rebuttal, the government offered selected portions of petitioner's testimony before a New York grand jury on January 9, 1958 (at a time when he was receiving company payments).[1] Over defense objections as to relevancy and the court's caution that no reference should be made to the subject of the grand jury investigation, four selected portions of this testimony were read. These excerpts included the statement of petitioner that he had lived in Pittston, Pennsylvania, all his life (R. 15), that he was presently a dress contractor and had no other business, that he had been in the dress business since 1953, and that it had been two years since he had worked in a mine (R. 18). The government also introduced excerpts from the grand jury transcript of petitioner's testimony that he lived at a certain address, that he had worked in the mines for the last time in 1956 as a motorman, and that during the war years he had represented mine employees as a committeeman to settle complaints for an average compensation from the union of fifteen to twenty-five dollars a month (R. 21, 29, 31).

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[1] The subject of the investigation was the meeting held at Apalachin, New York, on November 14, 1957, of persons believed to be important criminal leaders. See *United States* v. *Bufalino*, 285 F. 2d 408 (C. A. 2).

2. The circumstances of the grand jury hearing, occurring more than a year before petitioner was indicted in the present case, are as follows:

At the outset of the proceeding petitioner, appearing as a witness, was informed of his constitutional right not to answer any questions that might tend to incriminate him (R. 14). Thereafter he was asked and he freely answered questions as to his birth, citizenship, family residences, present occupation, prior employment, financial interest, and income. This included the statement that he had ceased working in the mines two years before (R. 15-19). He did not invoke his privilege against self-incrimination until he was asked if he knew Joseph Barbara (R. 19). Subsequently he invoked the privilege thirty-two additional times. He refused to answer questions as to his military service during World War II although he was advised that the statute of limitations had run as to any possible prosecution growing out of conduct at that time, or to testify about his membership in a labor union. He also invoked the privilege when asked if he understood that he could not refuse to answer questions which were not incriminating merely because he did not want to do so, and when asked how the answer to a question could incriminate him (R. 19–49). Petitioner was told by the Assistant United States Attorney at least five times that he was declining to answer questions that obviously could not incriminate and that to waste the time of the grand jury amounted to contempt—a communication that provoked either no response or the repeated invocation of the privilege not to answer (R.

25, 26, 28). A number of times petitioner was directed by the foreman, at the request of the Assistant United States Attorney, to answer questions (R. 23, 24, 25, 28). He complied a few times, supplying information that he had never served in the armed services, and that he had been a member of the United Mine Workers during the period when he was working in the mine (R. 23, 24).

ARGUMENT

1. The judgment of the court of appeals was entered on December 28, 1961. While the petition for a writ of certiorari was received by this Court on January 27, 1962, the record was not received until January 30; therefore the petition was not filed until January 30, thirty-three days after the entry of judgment in the court of appeals. Since Rule 22(2) of the Rules of this Court allows thirty days after the entry of judgment in the court of appeals to file a petition, the petition was out of time.

In any event, as we will now show, petitioner's contentions are without merit.

2. Petitioner's argument that his receipt of thirty-four separate payments from the company whose employees he represented constituted but one offense under the Labor-Management Relations Act is not supported by the language or the purpose of Section 302(b) of the Act.

Section 302(b) establishes as the unit of prosecution every delivery and every receipt of money or other thing of value. Subsection (a) makes it unlawful for the employer to pay or *deliver* any money

to a representative of his employees and, conversely, subsection (b) makes it unlawful for the representative to *receive* or *accept* any money.[4] Petitioner who received thirty-four varying amounts of money on thirty-four different occasions was guilty of the crime prohibited by the statute every time a delivery was made and accepted by him, whether of one or two checks.

This result, which is squarely based on the language of the statute, is further supported by its history and purpose. This Court has indicated that the history and purpose of each statute must be considered in determining the appropriate unit of prosecution.[5] The purpose of this legislation was clearly to prevent interference with the rights of either employees or employers by outlawing any payment or delivery (with stated exceptions) between employer and representative. *United States* v. *Ryan*, 350 U.S. 299, 305-306. See also Section 1 of the Act, 29 U.S.C. 141. In commenting on the language of a similar provision in the so-called Case bill (H.R. 4908, 79th Cong., 2d Sess.), the predecessor of the instant Act, Senator Pepper said (92 Cong. Rec. 4895, 5041):

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[4] The subsections also make it unlawful for the employer to agree to pay or deliver, or the representative to agree to receive or accept, any money.

[5] *Bell* v. *United States*, 349 U.S. 81 (Mann Act); *Harris* v. *United States*, 359 U.S. 19 (narcotics statutes); *Ianelli* v. *United States*, 357 U.S. 386 (narcotics statutes); *Blockburger* v. *United States*, 284 U.S. 299 (narcotics statutes); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (Fair Labor Standards Act).

> "That language forbids every type of delivery * * * and every type of receipt * * *.
>
> * * *
>
> * * * [T]he amendment * * * attempts to step in and lay down the terms and conditions by which, even under free contractual arrangements and agreements, an employer may not put any money or other thing of value into the hands of the representatives of employers.

As a measure outlawing payments for favor or influence in matters which corrupt parties and injure the public, the legislation is akin to that prohibiting bribery. The court below properly found this case analogous to *Patton v. United States*, 42 F. 2d 68 (C.A. 8), holding that each of several installments paid to a prohibition agent for protection was properly charged and punished as a separate offense. The court below said (Pet. 12): "We think it quite reasonable that Congress should have provided for a separate punishment each time an employee representative places a price upon two weeks of labor peace, just as it did for each transaction in which prohibition agents were paid for two weeks' protection." See also *Biddle v. Wilmot*, 14 F. 2d 505 (C.A. 8).

2. Petitioner has abandoned in this Court his previous contention that his statement before the grand jury that he last worked in the mines in 1956 was coerced and therefore *per se* inadmissible at the trial.*

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* As both courts below noted, this admission was freely and voluntarily given by petitioner at the beginning of his grand jury testimony after he had been fully advised of his rights and before he made any claim of privilege (Pet. 11; 191 F. Supp. 625, 630).

He argues (Pet. 7) rather that "some, if not all" of his statements before the grand jury, and received in evidence at trial, were illegally obtained and that therefore this Court should consider what effect the conduct of the United States Attorney should have upon the admissibility of any statements made during the hearing.

The short answer to petitioner's contention is that, other than his admission that he no longer worked in a mine, the grand jury testimony received at his trial (as to petitioner's address, his duties and last year of work in the mine, and his position as a union committeeman) was harmless and cumulative. Thus, even if it had been illegally obtained, it did not prejudice petitioner. Petitioner's earlier and important admission that he no longer worked in the mine was made before petitioner had made any claim of privilege or the Assistant United States Attorney had made any statements indicating that petitioner was required to answer. This earlier admission could not be affected by later events before the grand jury.

In any event, the large statements made by petitioner before the grand jury were also freely and voluntarily given without objection by petitioner. This record shows no impropriety on the part of the government prosecutor before the grand jury at any time. Petitioner, appearing as a witness, was fully advised of his constitutional right to invoke the privilege against self-incrimination and he assured the grand jury that he understood. The Assistant United States Attorney was not required thereafter to refrain from asking questions which sought answers which

might have been incriminating. *United States* v. *Neff*, 212 F. 2d 297, 312 (C.A. 3). It was up to petitioner to claim the privilege against self-incrimination which he in fact did some thirty-three times including those occasions when he had apparently no basis to believe that an answer would incriminate him. Since such refusals to answer were not valid (see *Rogers* v. *United States*, 340 U.S. 367, 370-373; *Hoffman* v. *United States*, 341 U.S. 479, 488), the Assistant United States Attorney was acting properly in warning petitioner that his actions amounted to contempt and that he was required to answer questions when his answers would not incriminate him. See *Brown* v. *United States*, 359 U.S. 41. In these circumstances there is no basis for petitioner's contention that the testimony introduced at this trial was obtained by trickery.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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